HARVARD
LAW REVIEW.

VOL. VI. JANUARY 15, 1893. NO. 6.

WAIVER OF TORT.

II.

ASSUMING the existence of a case where the doctrine of waiver applies, the question arises, — if the tort has been committed by two or more persons, — as to the nature and extent of their liability: Are they jointly, severally, or jointly and severally liable? Must each answer *in solido*, or each only for the amount actually or constructively received by him?

In seeking an answer to these questions, it must be borne in mind that the object of the action is not to recover damages, but to make the defendant *disgorge*.[1] In National Trust Co. *v.* Gleason,[2] Rapallo, J., thus expressed the distinction: "To charge a party in an action of that character, the receipt of the money by him, directly or indirectly, must be established. His complicity in the crime is not the cause of action, but only an item of evidence tending to establish his interest in the proceeds."

Although in England the liability in tort of two or more joint tort feasors is held to be joint,[3] while in this country the liability is joint and several,[4] in all jurisdictions each tort feasor is liable to make good the entire damage done, since the damage is traceable to him as a moving cause. If, however, a wrong-doer is not liable in quasi-contract unless he has received some part of

[1] 6 Harvard Law Review, 223, 224.
[2] 77 N. Y. 400.
[3] Brinsmead *v.* Harrison, L. R. 7 C. P. 547.
[4] Lovejoy *v.* Murray, 3 Wall. 1; Elliott *v.* Hayden, 104 Mass. 180.

the plaintiff's property in the commission of the wrong, the extent of his liability would seem necessarily to be limited to that which he has received. This proposition, which is not disputed where the defendant is a sole tort feasor, would seem also to determine the extent of the liability where there are joint tort feasors. For if in the case of a sole tort feasor the defendant is only liable in quasi-contract for that which he has received, on what principle can he be made liable in quasi-contract in the case of a joint tort for what has been received by another *for himself, and not for the defendant?* Of course it is not necessary that the property come into the physical possession of the defendant; it is sufficient if it has been received for him by another acting under his authority.[1] And the fact of his agent's having absconded would constitute no defence.[2] But where that which has in fact been received by another is received only in part for the defendant, and the action is not in tort, the tort, to use the language of Rapallo, J., in National Trust Co. *v.* Gleason,[3] being "*only an item of evidence tending to establish his interest in the proceeds,*" it seems that on principle the extent of his interest in the property should be the limit of the recovery against him. If this view is correct, then his liability should be several, and not joint, or joint and several; for each obligation would depend upon questions differing in one particular, namely, the extent of the defendant's enrichment. Opposed to this view, however, both as to the liability being several and as to its extent, will be found *dicta* in The National Trust Co. *v.* Gleason,[4] and in The New York Guaranty and Indemnity Co. *v.* Gleason,[5] — *dicta* entitled, it must be admitted, to the weight of decisions, because of the consideration given to the question. And in accord with the *dicta* of these cases is the case of Carew *v.* Rutherford.[6] In all of these cases, however, the argument of counsel seems to have been addressed rather to the fact of liability than to its extent.

In City National Bank *v.* National State Bank,[7] the defendant sought to counter-claim against the plaintiff the sum of $25,661, loaned by it to one Hardie, a former president of the plaintiff,

[1] National Trust Co. *v.* Gleason, 77 N. Y. 400 (*semble*); Carew *v.* Rutherford, 106 Mass. 1.

[2] National Trust Co. *v.* Gleason, 77 N. Y. 400 (*semble*); New York Guaranty Co. *v.* Gleason, 78 N. Y. 503 (*semble*).

[3] 77 N. Y. 400.

[4] 77 N. Y. 400. [5] 78 N. Y. 503. [6] 106 Mass. 1. [7] 32 Hun, 105.

under the following circumstances. Hardie being indebted to the plaintiff, the latter, although removing him from its management, allowed him to remain as a figure-head, in order that he might more easily get money with which to pay off his debt; and for that purpose it conspired to help him raise money on certain worthless securities. In this way he was enabled to borrow from the defendant $25,661, $13,000 of which was applied in payment of his debt to the plaintiff. The trial judge having refused to allow the counter-claim, on the ground that the liability was joint, and not several, a new trial was granted.

Davis, P. J., delivering the opinion of the court, said: —

"But it is insisted, in substance, that such an action on the implied promise would be on a joint and not several contract, and that for that reason, inasmuch as Hardie is not a party to the action as plaintiff or otherwise, the implied contract cannot be set up in this suit as a counter-claim. We think the implied contract in such case which arises upon waiver of an action for tort is joint and several, and not joint alone. Such was the nature of the tort, and each party could have been separately sued upon it; and the same reason extends to the implied contract. Either conspirator may be sued upon his implied promise, and be made to answer for the whole of the money obtained by the fraud consummated under the conspiracy."

It is perfectly clear that the plaintiff should have been held liable to the defendant to the extent of $13,000, the amount which it actually received from Hardie. But it seems impossible in point of principle to support the decision so far as it holds the plaintiff liable for the entire amount received by Hardie from the defendant; nor can one reconcile it with the decision in National Trust Co. *v.* Gleason.[1] Hardie clearly did not borrow the money for the plaintiff, and was therefore not the plaintiff's agent. And while the plaintiff's assisting Hardie in defrauding the defendant would render the plaintiff liable, if sued in tort by the defendant, to make good the damage done by Hardie, it does not render it liable either severally or jointly to refund that which had not been received by it.

So far as the case holds that the liability is several, it should and would be followed. It does not result from this suggestion that the tort feasor into whose possession the property is actually traced can reduce the amount of his liability by showing that he

[1] 6 Harvard Law Review, 269, 270.

has transferred the property in whole, or in part, to another for whom he always held the whole or a part of it. The moment it actually came into his possession, the obligation was imposed upon him of restoring it to the plaintiff; and that obligation he cannot escape by otherwise disposing of the property.

There remains to be considered the question of what amounts to a conclusive election, and the effect thereof. A person having the right to sue in quasi-contract or in tort may, by his conduct before action brought, lose one or both rights. Thus, for example, if one having the right to sue another for a conversion, demand and receive from the tort feasor the money received from a sale of the property, he has of course, by the receipt of the money, extinguished the claim for money had and received; and since he should not have both the property and its proceeds, he can no longer sue in tort.[1] If, however, the money is taken, not as the proceeds of the property, but in diminution of damages, such a receipt will not be treated as an election. Unless, however, the facts warrant the inference that the money is received, not as the proceeds of the sale or transfer, but in mitigation of damages simply, then by such receipt the plaintiff precludes himself from suing in tort.[2] An unsatisfied demand will not preclude the plaintiff from electing between remedies. Thus in Valpy *v.* Sanders,[3] the defendant bought goods from the servant of an absconding tradesman in circumstances rendering him guilty of a conversion as against the plaintiff, afterwards appointed assignee. The plaintiff sent an invoice of the goods to the defendant, demanding payment. The defendant refused to pay, claiming a set-off against the bankrupt. It was held that this demand did not prevent the plaintiff's suing in tort.

Assuming an unsatisfied demand not to preclude one from electing between the two rights, the question arises as to the effect of an action brought, but not prosecuted to judgment. In Thompson *v.* Howard,[4] the defendant was sued in tort for enticing the plaintiff's minor son into his service. He pleaded in bar that he had been previously sued in assumpsit by the plaintiff seeking to recover the value of his son's services, the action being discontinued

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[1] Brewer *v.* Sparrow, 7 B. & C. 310; Smith *v.* Baker, L. R. 8 C. P. 350.

[2] Vernon *v.* Lythgoe, 5 H. & N. 180; Bradley *v.* Brigham, 149 Mass. 141.

[3] 5 C. B. 887. See also Morris *v.* Robinson, 3 B. & C. 196.

[4] 31 Mich. 309.

after a disagreement of the jury. This was held a good plea in bar.

Graves, C. J., delivering the opinion of the court, said: —

"A man may not take contradictory positions, and where he has a right to choose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge, or the means of knowledge, of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again.

"*As there was no evidence or claim that the parties ever actually agreed together at all in regard to the minor's services*,[1] it was not possible to refer the assumpsit to any real agreement of a date later than that of the defendant's supposed wrongful enticement, and not possible to infer that the assumpsit rested on a distinct arrangement, and left the original wrong as a ground for a separate suit.

"The first action extended to the minor's services from the beginning; and, when the plaintiff brought it, he thereby virtually affirmed that his son was with defendant in virtue of a contract between the latter and himself, and not by means of conduct which was tortious against him.

"His proceeding necessarily implied that defendant had the young man's services during the time with plaintiff's assent, and this was absolutely repugnant to the foundation of this suit, which is that the young man was drawn away and into defendant's service against the plaintiff's assent.

"The case is, then, subject to the doctrine before stated, and the election involved in the first suit precluded the plaintiff from maintaining this action for the wrong."

It is respectfully submitted that the doctrine invoked by the court had no application to the case under consideration. Indeed, the court, for the purpose of defeating the plaintiff, assumes as a fact what it knows and states to be not a fact, namely, the existence of a contract between the plaintiff and the defendant. Having shown that the plaintiff must have made the same state of facts the basis of both actions, since there was really no contract between the plaintiff and the defendant, the court then assumes the existence of a contract for the purpose of defeating the plaintiff in the action of tort.

The plaintiff in Thompson *v.* Howard, notwithstanding the discontinuance of his former action, could have brought another action in assumpsit. The defendant, therefore, is not in a position

[1] The italics are the writer's.

to avail himself of the rule of law expressed in the maxim: *Nemo debet bis vexari pro eadem causa;* for there is no more double vexation involved in an action of assumpsit followed by an action in tort, than if the action of assumpsit were followed by another action in the same form. Nor does the court rest the decision on the ground of double vexation, but on the plaintiff's attempting to take contradictory positions. Its definition of a contradictory position is the use of remedies "so inconsistent that the assertion of one involves the negation or repudiation of the other." Now, a nonsuit in trover would not prevent trespass, nor would a nonsuit in account prevent debt. Why, then, should assumpsit preclude the bringing of tort? They are both personal actions and actions on the case, and according to the *dicta* of the early cases the bringing of the one if not prosecuted to judgment should not preclude one's resorting to the other.[1]

The only possible way in which the one can be said to be "the negation or repudiation of the other" is to use, in order to deny a remedy, a fiction adopted solely to give a remedy.[2]

The most common illustration of the doctrine misapplied in Thompson *v.* Howard is the case where a party having a right to rescind a contract because of fraud, repudiates the contract and

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[1] Holt, C. J., in Lamine *v.* Dorrell, 2 Ld. Ray. 1216; Hitchins *v.* Campbell, 2 Wm. Bl. 827.

[2] Of the cases cited by the court in Thompson *v.* Howard, none support the decision. In Smith *v.* Hodson, 4 T. R. 211, the court held that a party who sues on a contract which he might have disaffirmed, thereby enables the defendant to plead a set-off; though had the plaintiff sued in trover, he could not have so pleaded. And of the soundness of this decision there can be no question. In Rodermund *v.* Clark, 46 N. Y. 354, it was held that one who retains possession of a vessel, of which he was part owner, refusing to deliver it to one to whom the co-owner had sold the whole vessel, could not afterwards by suffering a judgment by default in favor of the purchaser, sue the co-owner as for a conversion; although had he suffered the purchaser to take the vessel at the time of the purchase under the bill of sale, he could have maintained the action. As the surrender of the possession by him was held essential to make the act of the co-owner effectual and tortious, it is clear that when he retained the possession and refused to deliver under the bill of sale, the force of the act done by the co-owner was spent, and no independent act of the plaintiff — such as suffering a judgment by default — could revive it. And while a *dictum* of Bovill, C. J., in Smith *v.* Baker, L. R. 8 C. P. 350, supports the decision in Thompson *v.* Howard, this is not at all true of the decision. It was simply held that one who had under an order of court received the proceeds of sale could not afterwards bring an action in trover because of such a sale. That is to say, as one is not entitled to both the property and its proceeds, he cannot recover the proceeds, and yet complain of the sale which produced the proceeds. In Jewett *v.* Petit, 4 Mich. 508, it was simply held that one cannot repudiate in part a compromise induced by fraud.

sues in tort, or, with full knowledge of the facts, sues on the contract. In such a case the assertion of the two rights would involve the plaintiff, in the language of the court in Thompson *v.* Howard, in "contradictory positions," the assertion of the one involving the negation or repudiation of the other. Since he must deny the validity of the contract to take advantage of the fraud, having sued for the fraud, he cannot afterwards treat the contract as unobjectionable;[1] and since he cannot sue on such a contract without affirming its validity, it is highly proper that he should not be allowed to blow hot and cold, and thereafter to treat the contract as invalid.[2]

But in cases of waiver of tort, instead of the tort disappearing when the action of assumpsit is brought, the action of assumpsit could not be maintained without proof of the tort.[3] How then can one be said to occupy "contradictory positions," *in which the assertion of the one involves the negation or repudiation of the other,* when to recover in either action he must establish that the defendant is a tort feasor?

Where an action is prosecuted to judgment, the rule, *Nemo debet bis vexari pro eadem causa,* of course applies, and all rights are merged therein.[4] That this maxim may be invoked, the remedies must, however, have been co-existent.[5] Thus in Browning *v.* Bancroft the defendant, who by fraudulent representations had obtained from the plaintiff certain goods, and who had sold part of them, pleaded, in bar to an action of replevin for the remainder, the fact that the plaintiff had recovered in an action for money had and received the proceeds of the goods sold. But the action of replevin was allowed; the remedies were not co-existent. Of course, if in the action for money had and received it had been decided that the defendant was not guilty of the fraud charged, that fact could have been pleaded in bar of the action of replevin, the question being *res adjudicata.*[6]

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[1] Moller *v.* Tuska, 87 N. Y. 166.

[2] Seavey *v.* Potter, 121 Mass. 297; Acer *v.* Hotchkiss, 97 N. Y. 395.

[3] Huffman *v.* Hughlett, 11 Lea, 549.

[4] Hitchin *v.* Campbell, 2 Wm. Bl. 827; Buckland *v.* Johnson, 15 C. B. 145 (*semble*); Bradley *v.* Brigham, 149 Mass. 141; Boots *v.* Ferguson, 46 Hun, 129.

[5] Browning *v.* Bancroft, 8 Met. 278.

[6] Hitchin *v.* Campbell, 2 Wm. Bl. 827.

It has been assumed up to this time that the tort is waived either by the act of the injured party before action brought, or by the bringing of an action. The waiver may,

Thus far the effect of waiving the tort has been considered on the assumption of there being a sole tort feasor. The question naturally arises as to the effect of the waiver in the case of joint tort feasors. Suppose A and B join in the commission of a wrong: what effect has the waiver of tort as to A upon the right to sue B in tort? Or suppose A to be sued in tort: what effect has the failure to waive the tort as to A upon the right to sue B in *quasi*-contract? In Buckland *v.* Johnson [1] the plaintiff, having recovered a judgment in trover against one of two joint tort feasors for a conversion of property by a wrongful sale, and being unable to realize upon the judgment, sued the defendant, the other tort feasor, in a count for money had and received to recover the proceeds of the sale. The money arising from the sale was received by the defendant alone, and not by the tort feasors jointly. It was held that the judgment in trover was a bar to this action.

The reasoning by which this conclusion was reached will be found in the following extract from the opinion of Jervis, C. J.: —

"The authorities show, and indeed it is not denied, that if Thomas Barber Johnson, the son, had received the money as well as converted the goods, and Buckland had sued him in trover and obtained a judgment against him, even though it had produced no fruits, that judgment would have been a bar to another action against him for money had and received. . . . The whole fallacy of the plaintiff's argument arises from his losing sight of the fact that by the judgment in the action of trover the property in the goods was changed, by relation, from the time of the conversion, and that, consequently, the goods from that moment became the

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however, be asserted by counter-claim or set-off. Allen *v.* United States, 17 Wall. 207; Farnum *v.* Linsey, 20 Kans. 235; Challeis *v.* Wylie, 35 Kan. 506; Eversole *v.* Moore, 3 Bush, 49; Gordon *v.* Bunner, 49 Mo. 570; Andrews *v.* Artisans' Bank, 26 N. Y. 298. See, however, *contra*, Rickey *v.* Bly, 115 Ind. 232; Wood *v.* Ayres, 39 Mich. 345.

In Eversole *v.* Moore, the defendant, being sued as administratrix, pleaded as a set-off the conversion by plaintiff of personal property of the intestate by the forcible taking thereof. The plea was sustained on demurrer. Robertson, J., delivering the opinion of the court, said: "And although tort cannot be set off against contract, yet the trespass in this case may be waived, and instead of suing for indeterminate damages arising *ex delicto*, an action *ex contractu* might be maintained for the value of the property converted on an implied promise to pay the value of it; consequently *indebitatus assumpsit* might be maintained for that value. And that which the appellant might have recovered in such an action, she may plead as a set-off in this case, as the demands of both parties arise from contract, express or implied, to pay a certain sum in money (*the value of property, not damage*). . . . And though the answer shows a tortious conversion, yet its election to demand only the value of the property waived the tort, and relied on implied contract, which might be enforced by *indebitatus assumpsit*."

[1] 15 C. B. 145.

goods of Thomas Barber Johnson, and that when the now defendant received the proceeds of the sale, he received his son's money, the property in the goods being then in him."

In considering this decision it must be remembered that two of the premises from which the court drew its conclusions are not law in this country. The court assumed first that a judgment unsatisfied against one of two joint tort feasors barred an action against the other. This is not true in the United States.[1] It was further taken for granted that by the judgment the title was vested in the defendant in the first action as of the time of the conversion. This does not represent the American law.[2]

If, then, the decision is to be followed here, it cannot be justified on either of the above assumptions.

It is true, as stated by the court, that a judgment in trover, though unsatisfied, bars an action against the same defendant for money had and received, assuming him to have sold the goods and to have received the proceeds. This is because no one should be subjected to double vexation. But as the doctrine of double vexation is not involved where a plaintiff having an unsatisfied judgment against one of two joint tort feasors seeks to recover against the other, the two cases are not, as the court thought, analogous. Assuming, however, the correctness of the English doctrine that the liability in tort is joint, and not joint and several, it still seems impossible to support the conclusion reached in Buckland *v.* Johnson. The plaintiff recovered in the first action in tort, and not in the count for money had and received, because it appeared that the money had been received, not by the then defendant, but by the present defendant, whose liability in the count for money had and received was therefore several, and not joint; yet the court held this several liability to be barred by an unsatisfied judgment obtained against a third party. In Floyd *v.* Browne[3] the same decision was reached.

In Terry *v.* Munger[4] it was held that an unsatisfied judgment against one of two joint tort feasors obtained on a count for goods sold and delivered could be pleaded in bar by the other tort feasor when sued in trover for a wrongful conversion of the property.

[1] Lovejoy *v.* Murray, 3 Wall. 1; Elliott *v.* Hayden, 104 Mass. 180.

[2] Dow *v.* King, 52 Ark. 282; Atwater *v.* Tupper, 45 Conn. 144; United Society *v.* Underwood, 11 Bush, 265.

[3] Rawle, 121.

[4] 121 N. Y. 161.

The following extracts from the opinion of Peckham, J., shows the line of reasoning adopted: —

"The contract implied is one to pay the value of the property *as if it had been sold*[1] to the wrong-doer by the owner. If the transaction is there held by the plaintiff as a sale, of course the title to the property passes to the wrong-doer when the plaintiff elects so to treat it.

"The plaintiffs having by their former action in effect sold this very property, it must follow that at the time of this one, they had no cause of action for a conversion in existence against the defendant herein. The transfer of the title did not depend upon the plaintiff's recovering satisfaction in such action for the purchase price."

The writer has endeavored heretofore to show that the fiction of a promise invoked in the cases treated under this title was originally adopted simply for the purpose of pleading; the action of assumpsit, which is in form, and originally always was in fact, based on a promise, being the only remedy open to the plaintiff seeking to enforce the quasi-contractual obligation, and that the real ground of liability is the fact that it would be unjust if the defendant were not compelled, at the option of the plaintiff, to pay for value received. And if such is the case, then the use of the fiction should cease with the necessity which gave rise to it; and when used it should be recognized as a fiction, and treated as a fact only for the purpose for which it was invented. Having been adopted for the purpose of giving a remedy, under a system in which forms were paramount to substance it should not be used for the purpose of denying a remedy. And certainly its use for such a purpose cannot be justified in a jurisdiction, as in New York, where forms of action are no longer recognized, the substance being everything, and the form nothing. Now, every one knows that where one man tortiously takes the goods of another, there is no sale between those parties; and yet the highest court in the State of New York gravely asserts that there was. In other words, a fiction to which it is no longer necessary to resort in New York in order to give a remedy, is there resorted to to deny a right. And the court says that there is no tort where but for the proof of a tort there could have been no recovery against any one. The decision will probably never be cited as illustrating the maxim, *In fictione juris subsistit equitas;* and it is certainly at variance with Lord Mansfield's notions of fictions, who said, in Morris *v.* Pugh,[2]

[1] The italics are the writer's.

[2] 3 Burr. 1243.

"But fictions of law hold only in respect *of the ends and purposes for which they were invented:* when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may show the truth."

Opposed to Terry *v.* Munger is the decision in Huffman *v.* Hughlett.[1] This was an action brought to recover the value of lumber which had been converted by one Springer and sold by him to the defendant. The latter pleaded that the plaintiff had previously sued Springer to recover the value of the lumber; that by the bringing of that action in assumpsit (which had been discontinued) the original tort had been waived; and that as a consequence the lumber bought by the defendants was the property, not of the plaintiff, but of Springer. This claim was denied by the court. Cooper, J., delivering the opinion, said: —

"If the action be in contract, it is not strictly a waiver of the tort, for the tort is the very foundation of the action, but, as Nicholson, C. J., has more accurately expressed it, a waiver of the 'damages for the conversion,' and a suing for the value of the property.[2] It is simply an election between remedies for an act done, leaving the rights of the injured party against the wrong-doer unimpaired until he has obtained legal satisfaction. If it were otherwise, the suing of any one of a series of tort feasors, even the last, on an implied promise, where there was clearly no contract, would give him a good title and release all the others. No authority has been produced sustaining such a conclusion, and we are not inclined to make one."

It is respectfully submitted that this decision, which is sound common sense, not only violates no legal principle, but, on the contrary, is a striking illustration of the proper theory underlying the principle involved in the doctrine of waiver of tort generally, and relegates the fiction to its proper province.

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[1] 11 Lea, 549.

[2] Kirkman *v.* Phillips, 7 Heisk. 222, 224.